Carlos Santiago Nino

THE LIMITS OF THE ENFORCEMENT OF MORALITY THROUGH THE CRIMINAL LAW*

What are the limits of the state power to punish people for the performance of some acts? This is an old and complex question. One of its facets is related to the issue of whether or not the mere immorality of an act provides a *prima facie* reason for resorting to the threat and imposition of punishment against the person who intends to perform or actually performs that act. The competing positions on this particular issue have extensive ramifications which reach out into several aspects of the adjudication of criminal responsibility and presuppose radically different views of society. The purposes of this article are, first, to identify and to distinguish the social conceptions underlying the opposite answers to the aforementioned question, and, secondly, to show some of the implications that each of those answers has for a system of criminal law.

1. The Perfectionist and Liberal Views on the Legal Enforcement of Morals

The enforcement of morals through the law in general, and particularly through the criminal law, has been the theme of a deservedly famous debate which took place in English-speaking countries some years ago. The main protagonists of the debate were Lord Devlin and Professor H. L. A. Hart.[1]

Illuminating as this discussion was, it did not go, however, deep enough into the articulation of the competing views about the limits of legal interference with individual conduct, although this articulation is needed in order to infer specific guidelines for, among other issues, criminal legislation and adjudication.

At the beginning of his essay *Law, Liberty and Morality*[2] Hart makes two important distinctions which reveal

J. J. E. Gracia et al. (eds.), Philosophical Analysis in Latin America, 93–113.

the possibility of extending the scope of the controversy beyond the limits set out by its protagonists. The first distinction points to the fact that the controversy is a moral one about whether the law should enforce morality. Hart makes it clear that the point of view from which the polemic is developed is the point of view of a critical morality, that is to say, the moral principles that one holds valid independently of their social currency. The second distinction is that the modern polemic deals not with the problem of which morality may be enforced by the law (that was, according to Hart, the subject of older controversies), but with the problem of whether or not the fact that a morality has gained acceptance in a certain community has any significance sufficient to justify its enforcement. In sum, the subject of the controversy is whether or not our critical morality supports the contention that the law should enforce the positive morality of society, whatever its content.

Hart advances convincing arguments against two variants of that contention: an extreme one, defended by Stephen, which sees the enforcement of positive morality as something valuable in itself, and a more moderate one, supported by Lord Devlin, which considers that the enforcement of positive morality is a necessary means of preserving the social structure. So far, so good. But Hart consciously leaves aside, as he anticipates in those preliminary remarks, the consideration of a less vulnerable position which might reject the moral positivism of Stephen and Lord Devlin, but, nevertheless, agree with them in asserting that the law should prohibit many other immoral acts apart from those that harm others. The importance of taking account of this position, whether démodé or not, is not only its possible inherent appeal but also the fact that it might cast doubt upon the intelligibility and consistency of some formulations of the contrary outlook, which holds that only harmful acts may be punished.

Consider this possible series of arguments:[3]

(a) One must concede that the mere existence of some moral consensus is not by itself a good reason for its legal enforcement. Thus, the claim that the law should enforce 'morality' must be interpreted as referring to a "valid critical morality."

(b) The claim thus interpreted is analytic. It states that, for a legal system to be justifiable according to any critical morality, it must enforce the principles of that critical morality. Nobody would deliberately deny this tautology. So, it is absurd to maintain that the law should not enforce or should be neutral toward moral standards. Surely utilitarians do not maintain this; they accept implicitly that the law should enforce the content of what they consider to be a valid critical morality. For they maintain that an act is immoral when it is harmful to other people and that the fact that an act is harmful (i.e. immoral) is a relevant, though not necessarily a conclusive, reason for making it a crime.

(c) If there is a disagreement between a utilitarian and another over the legal prohibition of acts such as incest or homosexuality, what is it but a clash between different moral systems? It is a discussion not about whether or not the law should enforce some moral system, but about which moral system should be enforced. What is not possible is to admit simultaneously that acts such as incest or homosexuality are indeed immoral and deny that their immorality is relevant to the question of whether they should be crimes. So, the contention that only harmful acts should be punished can only be reasonably upheld by a supporter of a utilitarian morality.

(d) Perhaps the issue is clouded by the nature of the examples given. It is improbable that people who, although not utilitarians, object to the punishability of acts such as homosexual intercourse or incest, would really think that those acts contravene a valid critical morality; they would probably think, instead, that those acts are deviations from mere social customs or manifestations of a pathological condition. Whether this is so or not, the matter could be greatly clarified if we were to adduce other cases whose immorality is less controversial. Consider, for instance, the possibility of there being harmless acts of racism. A consistent utilitarian would surely stick to his principles and maintain that even those acts are not immoral and, thus, should not be prohibited by law; but many people would resist the conclusion that harmless racist acts are not immoral; if so, they should be prepared to accept that laws should, in principle, prohibit them.

If this line of argument is sound, it will make some formulations of a well-known liberal view about the permissible content of criminal laws seem unintelligible. For this view is not necessarily tied to utilitarian morality but, nonetheless, it proclaims the value of excluding harmless acts from the sphere of legal interference. It is true that probably many liberals do not consider that mere unorthodox sexual practices are immoral, but surely most non-utilitarian liberals would maintain that actions motivated by racial attitudes are immoral whether harmful or not. However, many of those liberals would not only accept but strenuously emphasize that those immoral harmless actions should not be prohibited by the law; they would make a virtue out of proclaiming that they are anxious to protect the right to perform morally heinous but harmless actions. How can this position be justified or even consistently and intelligibly formulated? Apart from the problem that the moral justifiability of a legal system seems to require it to reflect the prescriptions of the chosen critical morality, there is also the problem that the justification of laws against harmful acts seems to lead, ultimately, to the claim that to inflict harm is immoral, which is, ex hypothesi, also true of some acts that are not harmful.

The first step toward the clarification of what can be taken as the paradigmatic liberal viewpoint about the relationship between law and morals, is to realize that at least one of the contentions contained in the foregoing argument is unwarranted. This is the assertion that the statement that the moral justifiability of a legal system requires it to enforce valid moral standards, is an analytic one. This is not so. In order to see this, it is enough to consider the case of an anarchic ideology according to which any sort of deprivation of goods, such as life, freedom, etc., is in any circumstance immoral. So, it condemns as immoral not only murder, theft, etc., but also legal punishment and the law which authorizes it. This would be a logically consistent morality. A legal system is objectionable from the point of view of a critical morality if it violates some of its principles (in this example, if it authorizes punishment), but not if it omits remedies, sanctions, etc. for the violation of those principles, unless the morality in question included a principle that the rest of its principles should be enforced in certain

specified ways. Obviously, laws and penalties, on the one hand, and the acts to which those penalties are attached, on the other, are separate items that could be evaluated independently by a moral system; the morality or the moral necessity of the punishment of an act cannot be derived from the immorality of the act itself, except by the interposition of a moral principle to that effect. So, the clash between different moral systems about this matter is not necessarily the result of differences over what acts are considered immoral, but could be due to differences over the principles that should govern the relationship between immorality and crime.

Therefore, to maintain that certain acts are immoral but that the legal system should not interfere with them is a logically consistent position. But, of course, the fact that a position is logically conceivable says very little about its plausibility, and the plausibility of this position is far from obvious. Why is it asserted that the immorality of an act is not, in itself, a prima facie reason for making it punishable? Is it not, in principle, valuable to prevent the occurrence of recognized immoral acts? Is it not even that when the liberal is pressed to justify why harmful acts are to be prevented he will in the end state that to cause harm is immoral?

Well, the plausibility of this position is dependent on its formulating a persuasive general explanation which enables us to distinguish among different sorts of immoral acts which ones should be punished. This explanation must be compatible with a non-utilitarian morality, since it is a non-utilitarian liberal position that is in question; as we have seen, a utilitarian needs only call attention to the content of his morality, since he may accept that the immorality of any act (i.e. its harmful character) is a relevant, though not conclusive, reason for justifying the law in interfering with it. Besides, I think that if that explanation gave some credence to the idea that, in some sense of 'immorality,' the immorality of actions has some relevance for their legal prohibition, it would be more plausible; I agree with some authors[4] that to hold, without qualifications, that the law should be neutral toward moral standards that we accept as valid is unreasonable.

There is one particular type of liberal doctrine which has the above-mentioned features. That is to say, it is not committed to a utilitarian morality and, consequently, is compatible with the view that some harmless acts are immoral (although whether or not this is exemplified by deviant sexual behavior is another matter). Even when it maintains that harmless acts are not to be legally interfered with, it need not give blanket support to the idea that the law should be neutral toward a valid moral system; furthermore, it is independent of the antithesis between moral positivism and moral idealism.

This type of liberal doctrine, which undoubtedly underlies many of the discussions on this subject, is the well-known one that is currently opposed to the philosophy variously called 'perfectionism,' 'Platonism,' 'totalitarianism' (in the original sense and not in the current pejorative one), etc. It is not easy to formulate a precise and sound account of those assumptions of the liberal, anti-perfectionist, view which have a direct bearing upon the issue of the relationship between law and morals. However, I am inclined to describe tentatively those assumptions (and, by contract, those of its rival) along these quite crude lines.

Almost all moral systems, including many utilitarian ones, allow for two different kinds of moral judgments. One kind evaluates actions according to whether or not they contravene moral rules which prohibit bringing about certain states of affairs; they decide whether an action is right or wrong on the exclusive basis of its properties and consequences and with independence of any evaluation of the personality of its agent. The other evaluates actions taking into account their bearing upon the quality of the agent's personality. Judgments of this second sort decide whether the agent's actions (which may or may not cause harm to others) are self-degrading, that is to say, whether the performance of those actions allows the attribution to the agent of a defect of moral character. Obviously, this kind of judgment takes into account certain ideals of human excellence. It could well be the case that a morally wrong action is not taken as depraving the agent just because his ulterior purpose satisfies an underlying ideal of human excellence. Conversely, we can praise a man for a supererogatory act that realizes to a high degree a personal

ideal in spite of or precisely because of the fact that the action was not prescribed by moral standards. So, moral judgments of this dimension are not restricted to the verification that some act violates certain moral standards; they determine whether those acts degrade the agent so much that he falls short of some minimal ideal of human excellence. Evidently, it is in relation to this second kind of moral judgment that the inquiry about the agent's intentions, motives and psychological traits is essential; the extent to which a morally wrong act degrades the agent in relation to certain ideal of a good person is dependent on whether or not that action was intentional, what were the motives for performing it, and what connection it had with his psychological constitution.

A utilitarian morality does not necessarily exclude moral judgments about the bearing of certain actions upon the quality of the agent's personality. Its peculiarity would be that those judgments would have to be limited to actions that involve harms to other people; but a utilitarian could conceivably concentrate the focus on the extent to which a harmful action involves a degradation of its agent. In contrast, when a moral system condemns actions not harmful to other people (as well as prohibiting harmful acts) it provides instances in which only moral judgments of the second sort are relevant. The whole point of standards which proscribe harmless actions is to prevent the degradation of the agent in the performance of those actions and the failure to achieve ideals of human excellence. An obvious example of those standards is that which condemns unorthodox sexual practices because of particular ideals, sexual chastity, or owing to the belief that the indulgence in sexual intercourse is to be allowed only for the purpose of reproduction; others are the standards which condemn harmless racialism, occultism, consensual submission to conditions of slavery, begging, etc.

This account is obviously quite crude and further refinement is needed before it will be at all philosophically fecund. However, I think that a non-utilitarian liberal might make use of it to strengthen his position. He could say that behind the rejection of harmless immoral acts, there is the claim that legal systems must not be concerned with the evaluation of people's

personalities in accordance with ideals of personal goodness. He may state also that this does not imply that moral standards should not be legally enforced; they can be, insofar as the enforcement does not take into account the bearing of supposedly morally wrong actions upon the moral fiber of their agents. This would, of course, have the consequence that moral disapproval of actions whose only result is self-degradation should not be enforced, but this responds to a more general contention than the mere claim that only harmful actions should be legally prohibited. The contention that the moral evaluation of people's personalities should not be legally relevant is also applicable to cases of harmful actions (and, so, it is an issue even when a utilitarian morality is adopted); it implies that the prohibition of acts harmful to others must not be qualified by considerations of their effect on the moral fiber of the agents. This is quite important because there may well be many people, including utilitarians, who accept that only harmful acts should be punished but concede that the effect of the act on the agent's personality is relevant to the implementation and distribution of that punishment. The rejection of this contention is based on the fact that the same reason that militates against punishing harmless acts, militates against making the punishability of harmful acts dependent, in some way or another, on judgments about the moral degradation of the agent. And the reason is that the law should not embrace ideals of human excellence and discriminate among people in virtue of their moral worth and the quality of their modus vivendi; the law should treat the saint and the morally depraved equally, judging them in accordance with the face value of their actions. This, as we shall see later on, has a considerable bearing upon the treatment of subjective attitudes.

The justification of this anti-perfectionist doctrine lies beyond my concern.[5] It is undoubtedly quite complex and everybody is familiar with most of the arguments advanced. The justification may be connected with the adoption of a certain social ideal establishing the legitimate functions of social organization and the contention that these functions can be complied with insofar as the members of the community do not interfere with each other's life plans, whatever be their quality and whatever be the moral integrity of the people who subscribe to them. So, the social ideal defended is one that, unlike per-

fectionist conceptions of a good society, is not interlocked with the realization of personal ideals. The outlook can also enhance the value of moral experiment and the positive attractiveness of a pluralistic society whose members pursue different ideals of human excellence. The conception may rest on the tenet that personal ideals are not properly imposed by coercive means but by way of discussion and persuasion. It could, but need not, correspond to a relativistic view about the validity of ideals of personal goodness.

Instead of discussing the soundness of these justifications, I want to show the consequences that this liberal conception and the conflicting perfectionist outlook have upon the framing and, particularly, upon the application of criminal laws. I want to point also to the affiliation of current ideas about the matter with each conception.

2. Perfectionist and Liberal Assumptions in Criminal Legislation and Adjudication

Some of the consequences, and corresponding difficulties, that the adoption of one or the other of these opposite ideologies involve, arise at the stage of legislation, others, at the stage of adjudication (even when they may well be the object of legislative provisions). I shall make a very brief review of some well known implications of the anti-perfectionist and perfectionist outlooks upon the framing of penal laws and, then, I shall concentrate my attention on consequences that are generally confronted in adjudication.

Obviously, a perfectionist conception has a clear view about the scope of criminal laws. Any immoral act can in principle be converted into a criminal offence (or made the object of other kinds of legal interference), whether or not the act represents a harm to other people's interests or rights. The law must be an instrument for inducing people to embrace valuable ways of life and to realize ideals of human excellence. So, the perfectionist can avoid discussion of the social effects or possible harmfulness of the acts intended to be made into crimes and urge the punishability (depending on the personal ideals adopted) of acts such as deviant sexual behavior, consumption of drugs

or alcohol, begging and vagabondage, occultist practices, racist attitudes, contempt for patriotic symbols, the evasion of compulsory education, etc. (to mention only the most plausible ones). This position has some independence of that concerning the justification of punishment. Even when punishment is justified in relation to its deterrent effects, this justification can be combined with the idea of discouraging people from pursuing a degrading life.[6] However, this conception has a natural tendency to assign a more transcendental mission to punishment: either pure retribution or the symbolic reaffirmation of the moral values at stake.

The rejection of moral self-degradation as a reason for punishing actions accounts for the liberal concern to determine whether the actions proposed as candidates for punishment involve the invasion of other people's interests or rights. This confronts liberals with several well known difficulties.

One of those difficulties, which I shall mention only in passing, is put forward by the contention that self-degrading actions performed in public or which become public involve necessarily harms that the law must seek to prevent. Therefore, the distinction between acts that merely contravene personal ideals and acts that harm other people is sometimes replaced by the distinction between 'private' and 'public' acts.[7] One of the 'harms' most often alleged as resulting from public self-degrading actions is the repugnance which is aroused in many people who observe or come to know of the performance of those actions. In the face of this allegation, the question is the extent to which attitudes of intolerance intervene in the generation of those unpleasant feelings and, if so, whether a liberal legal system must protect some people against harms that tolerant persons do not suffer (perhaps the only personal virtue that liberalism encourages is tolerance). But, of course, other sort of harm, which presents different problems, can also be said to result from public self-degrading actions.

This difficulty is connected with another which is the object of extensive controversy, the justifiability of paternalistic criminal laws such as those declaring punishable attempted suicide, consensual homicide, the

evasion of compulsory education, drug addiction, not wearing seat belts in cars, etc. While perfectionism may advance straightforward justifications for these legal interferences, liberalism confronts the obvious obstacle that the notion of harm is dependent on the wants of the person supposedly affected. The current way of surmounting this obstacle is by saying that those laws are not intended to prevail over the overall wants of the person concerned, but to protect their future opportunities of choice against present choices that would preclude them. The idea is to preserve the capacity of men as choosing beings independently of the quality of their choices. But this suppression of certain choices in order to maintain the opportunities to undertake others is far from being clearly justified. Obviously a quantitative criterion is preposterous: for some decisions could be the supreme exercise of a man's capacity to choose (such as the decision as to whether or not to commit suicide), so that its suppression cannot be outbalanced by the possibility of making many other trifling decisions. Besides, it is obvious that almost all choices that men make preclude them from undertaking an indefinite number of others in the future. Therefore, the contention must be supplemented by some distinction of the choices that can be suppressed, at least in relation to their character as real choices if not to their content. Authors like Gerald Dworkin[8] have gone some way toward this, by indicating several circumstances in which decisions would not express the real will of individuals. Obviously, this involves the risk, as is pointed out by Berlin[9] and Dworkin himself,[10] of confusing what an individual would want, if he were in full possession of his capacity to make decisions and were supplied with all the relevant information, with what he <u>should</u> want according to some ideal of human excellence. Nevertheless, some decisions which a person makes in situations of compulsion, when emotionally disturbed, immature or not fully informed, and which one can predict, on the basis of some psychological generalisations, that he will probably regret later, should undoubtedly be discounted in the consideration of what constitute harms against which men ought to be protected. There is even some basis provided by certain theories of personal identity, for treating the self of an individual, who is under the disabilities just mentioned, as different from that at some other stage in his life, in which those disabilities are not present, and for protecting

him against harmful acts performed by his previous self as though against a third party.[11]

Another difficulty that could appear at the stage of framing criminal laws concerns the justifiability of excluding the possibility that a bare mental state could be a crime. A perfectionist need not necessarily favor legal interference with people's mere inner states of mind; most probably he would reject criminal laws of that sort on varying grounds, for instance, the difficulty of producing satisfactory evidence. However, it is not completely inconceivable that he might advocate that people should be punished for their bare beliefs and intentions, since the mere fact of entertaining them could involve a moral depravation, and punishment may serve as a public condemnation of it. Obviously, this is extremely repugnant to a liberal frame of mind. However, the task of justifying, from a liberal point of view, the non-punishability of mere mental states is not as easy as it seems <u>prima facie</u> to be.

The rationale traditionally advanced is that it is necessary to build a fence to protect freedom of thought and freedom of speech, so that there is some scope for developing and testing ideas and reasoning without anything to contend with other than rational argument and persuasion. Someone might, however, object that this applies only to some mental processes and their expressions, the holding of beliefs and opinions, which cannot be entertained or abandoned at will and have not, by themselves, effects in the external world. He might say that this does not apply to intentions, which can be suppressed when the fear of punishment intervenes and which involve practical dispositions with potential effects in the external world. He might add that, insofar as we are interested in preventing harms to other people, it is absurd to discriminate between different stages of the processes which produce those harms, erecting a barrier against legal interference with their mental stages. It is foolish to wait for a minute bodily movement before interfering with the production of harm, since the prospect of harm could entirely be based on the intention of the individual and the external activity in question may add nothing to the confirmation of that prospect. There is nothing sacred, he might claim, in the "mental" in opposition to the "physical," and it is preposterous to take people's bodily

movements as if they represented a sort of green light that allows us to act without violating their right to a free inner life. Perhaps the critic would propose the following flight of fancy in order to refute what he sees as the myth of the inherent sacredness of mental processes: if we lived in a world in which men had the power of telekinesis, would we have any doubt that it was legitimate to interfere with some mental processes in order to prevent outward harmful effects and to deter other people from forming similar intentions? Of course, our world is not like that. We cannot bring about the death of our enemies through merely intending it. But intentions are still important steps toward causing harm and people should be punished for their intending it, not because that intention makes the person blameworthy, but in order to prevent its materialization and to deter others from entertaining it.

What can be said against these criticisms? I think that they succeed in throwing doubts on traditional appeals to the inviolability of mental life based on claims of freedom of thought. Nevertheless, there are well known arguments in support of the non-punishability of intentions. The most obvious one is that advanced by Blackstone,[12] notwithstanding that his treatment of subjective attitudes is not exactly anti-perfectionist; it rests on the difficulties of getting reliable evidence about the existence of bare intentions. There is much to be discussed on this issue but, nonetheless, there is no doubt that the punishability of mere intentions would introduce many uncertainties and greatly increase the possibility of punishing innocent people. H. Morris[13] points out, besides, the absurdity of laws formulated so as to prohibit mere intentions. If we are interested in preventing subsequent acts, it is sufficient to prohibit those acts, since the person persuaded by that prohibition cannot have the intention to act but decide, at the same time, not to act. If the prohibition of the act is effective, its effect on potential criminals is to prevent them, not only from carrying out their intention but also from persisting in it or ever forming it in the first place. This is true, but, nevertheless, there is the possibility of combining prohibitions of certain <u>actions</u> with authorizations to punish those who merely intend to act (as in the case of attempts where it would be similarly absurd to <u>prohibit</u> the mere attempt). The decisive argument is one also suggested

by Morris[14] (although he gives it a transcendence connected with assumptions of Natural Law to which I cannot subscribe): Some intentions are firmer than others; the firmest of them logically imply taking steps to accomplish the intention in question. This degree of intention constitutes an attempt, and its punishability is justified, at least under certain conditions, by the considerable danger that harms may result from it. Less firm intentions are not so dangerous mainly because of the likelihood of a change of mind, and the evils that would ensue from punishing such intentions generally outweigh the advantages of suppressing the low risks involved in them. Among those evils it is necessary to count not only the possibility of punishing innocent people because of the unreliability of the evidence, but also the partial lack of inducement to refrain from materializing intentions already formed. For, once having the intention, the perspective of punishment would not operate as a motive against carrying it out; punishment would only deter at a subliminal level, preventing the formation of intentions. (This result could be partially avoided by fixing different degrees of punishment for mere intention and for attempt, but the perspective of a conviction as soon as an intention is formed would, in many cases, make a further dose of punishment not discouraging enough.)

These issues are mainly related to the framing of criminal laws. But the liberal and perfectionist outlooks also have different implications and raise different problems when applied to adjudication.

The most important of these implications are to be found in the treatment of subjective attitudes. I have said elsewhere[15] that the requirement that the person to be punished must have consented to undertake a liability to suffer that punishment (the principle of assumption of punishment), satisfies demands of fairness in the distribution of burdens imposed by the need for social protection. This, I think, is the only relevance that a liberal view may concede to the subjective attitudes of the agent. However, a perfectionist conception would assign to the requirement of certain mental states a much deeper significance. Insofar as the legal system is designed to promote personal ideals and the moral evaluation of personality is considered relevant for ascribing legal

responsibility, the motives and intentions of offenders must be central items in the determination of whether the rationale for punishing people applies in a particular case. Under this conception, to punish somebody in disregard of his state of mind is not only unfair; more than that, it implies perverting the true function of criminal law which is to denounce people with vicious dispositions, and provide occasions for their moral regeneration and the edification of others. It might be admitted that it is all to the good that punishment diminishes harm to society, but it would be stressed that that function can, in any case, quite well be satisfied if particular punishments are meted out only to those who have caused harms as a result of their wicked dispositions and not in pursuance of good motives. The harms that we must fear are those which are caused by depraved people; the rest are either justifiable or unavoidable. Thus, the necessary antecedent of punishment is a blameworthy or guilty mind; the punishable act must be the expression of a vicious personality. From this central requirement, the subjective attitudes that are needed for ascribing criminal responsibility can be inferred. Obviously an anti-perfectionist conception of the law disassociates itself from this. Intention and other mental states are not required because it is necessary to evaluate the agent's personality as expressed in the act and to determine whether that act reflects a vicious mind. If my consensual justification of punishment is adopted, to assert that a defendant has acquiesced in the eventuality of being punished does not involve holding him blameworthy any more than to assert that a contractor has consented to some consequences of the contract involves considering him reprehensible. The considerations that lead us to reject moral blameworthiness as a sufficient and proper reason for punishing somebody also lead us to reject it as a necessary condition for punishment. To require such a condition, even if only in addition to other conditions, would imply that the law should treat people differently according to their moral worth and, consequently, that legal adjudication should embrace ideals of personal goodness.

These competing conceptions of the relevance of subjective attitudes for criminal responsibility lead their supporters, obviously, to require different mental conditions. For a perfectionist conception the motives that an agent has for engaging in a crime should be highly

relevant, since the general plan of action, of which the act in question was a part, is decisive for judging the moral blameworthiness of the agent. In contrast, the requirement of mental states within a consensual justification of punishment is independent of the motives of the agent; whatever are the final purposes or goals of the offender (with the exception of some specific ones which merit some special treatment),[16] the fact that his act meets the conditions of the principle of assumption of punishment preempts the possible unfairness of such a measure when it is justified by the need for social protection. On the other hand, this latter anti-perfectionist rationale for requiring subjective attitudes preeminently requires knowledge that the conduct is punishable, which the perfectionist would only exceptionally require in cases in which the only moral significance of the action is that it is legally prohibited; in most cases the moral blameworthiness of the agent can be judged independently of his knowledge that the action is an offence. Needless to say, the differences between subjective attitudes (such as those between intention and knowledge), which are highly relevant to moral blame, may be immaterial to an anti-perfectionist rationale for requiring mental attitudes.

The perfectionist conception also has definite implications for the definition of situations where the offence would be justified. It can not only justify what it may consider to be only "technical crimes" (i.e. crimes performed not to fulfill some wicked purpose but perhaps to realize some ideal of human excellence), but can also favor a definition of traditional justifications, such as self-protection, necessity, exercise of a right, etc., so as to require a valid motive. Thus, for a perfectionist view it is, for instance, out of the question that a man who by chance repels his aggressor without intending to act in self-defence (since he did not realize that he was being attacked and his own act was, in fact, meant as an attack) should be exonerated. He has the same guilty intention that the man who actually is the aggressor. A similar solution will be applied to the case of a man who performs what is, in general, an offence without knowing that he had a special right or license to act as he did and believing that the act was unlawful. So, the distinction between justification and excuse loses much of its relevance, since the legitimacy of an action is partly dependent on the

motives and knowledge of the agent. Although it is obvious that a liberal strategy for adjudication will not characterize justifications so as to make them dependent on the evaluation of the agent's reasons for acting, it is impossible to determine exactly how it will define them, and, indeed, what relevance it will concede to the agent's knowledge and intentions, until a rationale of justifications has been presented.[17]

Of course, the opposition between a perfectionist and a liberal outlook about the relationship between criminal responsibility and moral blameworthiness also has relevant consequences for the selection and gradation of the penalty to be applied in particular cases. The perfectionist conception maintains that there is a prima facie case for adjusting the penalty which an offender must suffer in accordance with the degree of his blameworthiness, which would be determined by his motives and other features of his crime. This is obviously so when perfectionism is coupled with a restributive or denunciatory theory of punishment. But it is also the case even when it is coupled with a theory which makes the rehabilitation of actual offenders or the deterrence of potential offenders the goal of punishment, since the assessment of the offender's moral qualities will indicate how much and what sort of punishment is needed to induce the defendant to adopt the endorsed models of life and to discourage other potential lapses from human excellence. Besides, perfectionism contains no a priori reason for limiting the data that are relevant for evaluating the personality of the agent to the circumstances of the act for which he may now be punished. The agent's "criminal record" and general behavior may be decisive. A liberal conception of the criminal law rejects the foregoing criteria for selecting and gradating penalties, though it is not at all clear what it substitutes for them.

3. Concluding Remarks

While one may envisage virtually all the implications of the perfectionist conception of the criminal law, it is not so easy to adumbrate the implications of the liberal conception without further discussion. My opinion is that a full development of a criminal law system requires additional principles, some of which I have defended elsewhere.[18]

One of the most important issues in relation to which the liberal program is in need of much more elaboration is the definition of self-regarding actions. As we have seen, the punishability of allegedly self-degrading conducts--like the consumption or possession of drugs--might be defended on the basis of the argument that they generally involve harms or risks (other than that constituted by the injured feelings of the intolerant) to third parties, like, e.g., the harms which ensue from the imitation of bad example, the failure of the agent to contribute to his family's support or to the social wealth, the burden that he might import for public health services, etc.

In fact, even Mill acknowledged that it is difficult to find a self-degrading conduct which would not result in some harm to third parties:

> The distinction here pointed out between the part of the person's conduct which concerns only himself, and that wich concerns others, many persons will refuse to admit. How (it may be asked) can any part of the conduct of a member of society be a matter of indifference to other members? No person is an entirely isolated being; it is impossible for a person to do anything seriously or permanently hurtful to himself without mischief reaching at least to his near connexions, and often far beyond them... I fully admit that the mischief which a person does to himself may seriously affect both their sympathies and their interests, those nearly connected with him, and in a minor degree society at large...[19]

This acknowledgement seems to make ineffectual the liberal distintion between two dimensions of morality and, consequently, of two kinds of immoral conducts to the effect of legal interference with them: it seems that any actions which seriously contravene ideals of human worth tend also to violate standards of intersubjective morality, and are thus proper objects of legal interference. But I think that an adequate articulation of the liberal conception will save that distinction on the basis of a more precise characterization of the notion of harm to third parties. Pending that characterization, I dare suggest the following very general guidelines to be taken into account in it:

(i) When a harm to a person other than the agent is alleged, one must separate those cases in which the harm is caused by an act of the agent other than that which involves self-degradation, or by the fact that this act is done in special circumstances. For instance, the spread of drug addiction thorugh imitation or incitements is not caused by the mere consumption of the drug by a certain person, but by the fact of doing it in public or by the different act of offering the drug to others. These acts may be punished without doing violence to the liberal tenet.

(ii) One must also probe into the causal relation between the act and the alleged harm in order to determine whether the latter is really ascribable to the agent of the self-degrading conduct. For instance, if the harm has as its immediate cause a fully voluntary act of the very "victim," who is a responsible person,—like in many cases of imitative drug-consumption,--this is normally considered as a circumstance which "breaks" the causal chain leading to the former act,[20] in this case that of the "corrupting" agent. Besides, the ascription of causal effects to omissions--like the failure to contribute to the social welfare—requires a justified duty to act.[21]

(iii) Even when the harm is in fact causally attributable to the self-degrading conduct itself—and not to another act or surrounding circumstances—the distinction implicit in the liberal view can still be preserved and be operative if we reformulate so as to demarcate alternative results of a balance between, on the one hand, the importance that the conduct in question may have for the plan of life chosen by the agent, and, on the other, the extent and degree of interference that that conduct has for other people's own life plans. According to this reformulation, a self-regarding conduct would be an action such that if it were prevented, the central life-plan of the agent would be radically impaired to a considerably greater extent than any peripheral disturbance that its performance may provoke in other people's life-plans. This balance does not collapse into a utilitarian calculation insofar as we refuse to give full weight to the aggregative sum of other people's nuisances vis à vis the radical impairment involved in hypothetical restraint of the agent (thus, while, e.g. the homosexual tendencies of a man, may be restrained

insofar as they involve abusing young boys, no amount of nuisance of even very many--like the offensive sight of tranvestites or special costs for the public health service, etc.--may justify the preclusion of such a central item of somebody's way of life).

As I have said, this subject requires further elaboration, but, nevertheless, the kernel of the liberal conception of the criminal law is clear enough: it is not even a *prima facie* reason for punishing an action the fact that it taints the moral character of the very agent because it involves a failure to satisfy some model of human excellence or the choice of a repugnant life-plan. Only the circumstance that the act at stake impedes the choice or materialization of plans of life of people other than the agent grounds the power to punish him within the framework of a liberal society.

NOTES

* This article is a modified version of a chapter of my thesis accepted by the University of Oxford for the Doctor of Philosophy degree. I express my gratitude to my supervisors D. J. M. Finnis and Professor A.M. Honore and to my examiners Professor H. L. A. Hart and P. F. Skegg for their illuminating comments and objections.

1. See Lord Devlin, *The Enforcement of Morals* (London, 1965); H. L. A. Hart, *Law, Liberty and Morality* (Oxford, 1963) and *The Morality of the Criminal Law* (Jerusalem, 1964). Other contributions to the modern debate include, among many others, B. Mitchell, *Law, Morality and Religion in a Secular Society* (Oxford, 1967); R. Dworkin, "Lord Devlin and the Enforcement of Morals," *Yale Law Journal*, vol. 75, p. 986; A. R. Louch, "Sins and Crimes," *Philosophy* 43 (1968), 163 ff.
2. *Op. cit.*, pp. 17 and 22 *et. seq.*
3. For the formulation of some of these arguments I have taken into account the position of Louch in *op. cit.*
4. For instance, B. Gert, *The Moral Rules* (New York, 1973), p. 139.
5. I deal with it in two forthcoming articles: "Liberty, Equality and Causality" and "The Derivation of Two Principles of Liberalism."

6. For instance, Plato ascribes to Protagoras, in a famous passage, the idea that punishment should not be retributive but should 'look at the future' (an idea that Socrates does not contest in the dialogue), while maintaining, at the same time, that the object of punishment is to teach virtue. Protagoras, trans. by B. Jewett, Dialogues, Vol. I (Oxford, 1953), p. 324.
7. Article 19 of the Argentinian Constitution of 1853, which summarizes the liberal thesis in a beautiful way, focuses, however, the distinction between acts which are against "private morals" with the distinction between "private" and "public" acts, when saying: "The private actions of men which by no means offend the public morals and order and do not harm others, are reserved to the sole judgment of God and lie beyond the authority of magistrates."
8. In "Paternalism," in R. Wasserstrom (ed.), The Morality and the Law (Belmont, California, 1971).
9. In "Two Concepts of Liberty," in A. Quinton (ed.), Political Philosophy, (Oxford, 1967), p. 150.
10. Op. cit., p. 119.
11. See D. Parfit, "Later Selves and Moral Principles," in A. Montefiore (ed.), Philosophy and Personal Relations (London, 1973).
12. Commentaries, Bk. IV, Ch. II, cited by H. Morris in "Punishments for Thoughts," in Skummers (ed.), Essays in Legal Philosophy (Oxford, 1971), p. 110.
13. "Punishment for Thoughts," p. 95.
14. Op. cit., pp. 102 et. seq.
15. In "The Consensual Theory of Punishment," Philosophy and Public Affairs, forthcoming.
16. See my Los límites de la responsabilidad penal (Buenos Aires, 1980), ch. V.
17. I deal with the subject in Los límites de la responsabilidad penal (Buenos Aires, 1980) and La legítima defensa (Buenos Aires, 1982).
18. See mainly Los límites de la responsabilidad penal and "A Consensual Theory of Punishment," Philosophy and Public Affairs.
19. "On Liberty," in R. Wollheim (ed.), Three Essays (Oxford, 1975), pp. 98-99.
20. See, H. L. A. Hart and A. M. Honore, Causation in the Law (Oxford, 1959), pp. 38 et. seq.
21. I defend this view in "Da lo mismo omitir que actuar?" La Ley 1979-C-801